

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Writ Jurisdiction Case No.193 of 2017**

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Surendra Prasad, Son of late Rameshwar Prasad, Resident of Village- Saraiya, P.O and P.S. - Makhdumpur, District Jehanabad.

.... .... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Health, Government of Bihar, Patna.
2. The Director-in-Chief, Health Services, Bihar, Patna.
3. Civil Surgeon cum Chief Medical Officer, Patna.
4. Incharge Medical Officer, Primary Health Centre, Dhanarua, Patna.
5. The District Treasury Officer, Patna.
6. Sub Treasury Officer, Masaurhi, Patna.

.... .... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. Shiv Kumar, Advocate

For the Respondent/s : Mr. Sudhir Kumar Singh, AC to SC-23

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**CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN**

**ORAL JUDGMENT**

**Date: 01-05-2017**

Heard Mr. Shiv Kumar, learned counsel appearing for the petitioner and Mr. Sudhir Kumar Singh, learned Assisting Counsel to Standing Counsel No.23 for the State.

With the consent of the parties this writ petition has been heard with a view to its final disposal at the stage of admission itself.

The petitioner prays for issuance of a writ in the nature of certiorari for quashing the order bearing Memo No.892(4) dated 5.9.2016, whereby the claim of the petitioner for payment of arrears of salary for the period 8.3.2003 to 4.11.2013 has been rejected while allowing his back wages for the period subsequent thereto i.e. 5.11.2013 to 30.6.2014 which is the date of retirement of the



petitioner. A copy of the order is impugned at Annexure-9 to the writ petition.

The facts of the case lie in a very narrow compass. The petitioner was appointed as a Basic Health Worker vide order bearing Memo No.252 dated 28.1.1980 issued under the signature of the Civil Surgeon cum Chief Medical Officer, Saran at Chapra and was posted at Primary Health Centre, Abilpur, Dighwara. It is about 23 years of his appointment and having served in different Primary Health Centres that a show cause was issued to the petitioner as against his appointment by the Civil Surgeon cum Chief Medical Officer, Patna on 5.2.2003 and although a reply was filed by the petitioner explaining his appointment but it did not satisfy the Civil Surgeon cum Chief Medical Officer, Patna who vide Memo No.1858 dated 8.3.2003 cancelled the appointment of the petitioner without holding any enquiry.

The cancellation of appointment was questioned by the petitioner before this Court in CWJC No.14082 of 2003. The writ petition was heard along with other similar matters by a Division Bench of this Court and by a common judgment and order dated 26.6.2006 passed in LPA No.946 of 2003 and analogous cases the matters were disposed of with a direction to the Health Department to reconsider the matters and pass appropriate order in the light of



the law settled by the Supreme Court in the case of **Secretary, State of Karnataka vs. Uma Devi** reported in **(2006) 4 SCC 1**.

It is about two years thereafter that the cancellation of appointment of the petitioner was again upheld on grounds of being based on forged documents and which order was questioned by the petitioner before this Court in CWJC No.17145 of 2009. The said writ petition was heard analogous with some other writ petitions raising similar issues and was allowed in following terms vide judgment and order passed on 19.10.2011:

“All these petitioners have continued for more than ten years on their post without protection of any interim order by the Court or Tribunal. They all are appointed on vacant posts, possessed requisite qualification. In these circumstances, they are entitled to be reinstated on the post and continued on the post. They are also entitled for reinstatement with all consequential benefits.”

(Emphasis supplied)

The judgment and order was passed on 19.10.2011 and the petitioner tried to give his joining before the Civil Surgeon cum Chief Medical Officer, Patna vide Annexure-2 but was not accepted. The request was renewed again on 22.4.2013 by the petitioner vide Annexure-3 but again without success.

In the meantime, the State went in appeal questioning the judgment of the Single Bench giving rise to LPA No.380 of 2013 and the Division Bench while not interfering with the order of the



Writ Court in so far as it proceeded to quash the termination, modified the relief granted by the Writ Court in so far as it related to consequential benefits in the following terms:

“In view of the changed judicial trend with regard to back wages not being a matter of course even if the termination is set aside and that it cannot provide a double bonanza, we grant liberty to the respondent to represent that he has had no employment or source of income in the interregnum. The appellants shall then pass appropriate orders in accordance with law within a maximum period of four months on this aspect from the date of receipt and/or production of a copy of the order before them along with such representation. We set aside the order under appeal only to that extent.”

The judgment of the Division Bench was passed on 30.10.2013 and again the petitioner tried to give his joining but was not accepted and ultimately the petitioner was made to retire on 30.6.2014.

The petitioner thereafter was forced to come before this Court again in CWJC No. 21028 of 2014 praying for payment of his retrial benefits and other dues and by order dated 22.7.2016 the Director-in-Chief, Health Department was directed to reprocess the dues of the petitioner vide order present at Annexure-7. It is thereafter that the order impugned has been passed whereby the Director-in-Chief, Administration, Health Department, Bihar, Patna while allowing the arrears of salary for the period after 5.11.2013



which is stated to be the date on which the petitioner gave his joining after the disposal of the Letters Patent Appeal until his retirement on 30.6.2014 but the arrears of salary of the petitioner for the period preceding thereto i.e. 8.3.2003 to 4.11.2013 was refused and feeling aggrieved the petitioner is before this Court.

The reasons assigned for refusal of arrears of salary is that the petitioner has failed to produce any document that he was not gainfully employed. According to the petitioner, it was for the respondents to establish whether the petitioner was in gainful employment and not for the petitioner. It was also the argument of Mr. Shiv Kumar, learned counsel appearing for the petitioner that in similar situation, some other employees of the Health Department who were similarly terminated were not only reinstated but with all consequential benefits, the evidence whereof is present at Annexures 10 to 20 of the writ petition. With a particular reference of one Arvind Kumar learned counsel submits that this gentleman had approached this Court along with the petitioner through CWJC No.16907 of 2009 and which writ petition was allowed along with the petitioner's case vide Annexure-1. He submits that though the respondents have chosen to provide arrears to the said Arvind Kumar but have adopted discriminatory treatment in so far as the petitioner is concerned.



It is taking note of the submissions of the petitioner that the State was directed to reply and when he has returned with the second supplementary counter affidavit and Mr. Sudhir Kumar Singh, learned Assisting Counsel to Standing Counsel No.23 in particular reference to the operative portion of the Division Bench judgment in LPA No.380 of 2013 vide Annexure-4 has referred to paragraph 9 of the second supplementary counter affidavit to submit that the petitioner had other source of income and since the Division Bench had clearly observed that it is only where the petitioner would not have other source of income that his case for arrears of salary would be entertained, hence his claim has been rejected. Mr. Sudhir Kumar submits that the State has also moved in Special Leave Petition against the order of the Division Bench and which is yet pending.

Responding to the argument of Mr. Singh, Mr. Shiv Kumar learned counsel for the petitioner has relied upon a celebrated judgment of the Supreme Court rendered in the case of **Mohinder Singh Gill vs. The Chief Election Commissioner, New Delhi** reported in **(1978)1 SCC 405** and with a particular reference to the observation of the Bench at paragraph 8 of the judgment he submits that the respondents cannot deviate their stand by way of affidavit which is not found in the impugned order.



I have heard learned counsel for the parties and I have perused the records.

There is no dispute that the Division Bench while modifying the judgment of the Writ Court had granted liberty to the petitioner to represent before the authorities for claiming arrears stating that he had not been in employment or had other source of income, for the interregnum period. Accordingly the petitioner represented vide Annexures, 5, 6 and 8 before the authorities in which he has clearly stated that he has no source of income nor was gainfully employed, yet by the order impugned vide Annexure-9, the claim of the petitioner has been rejected simply attaching failure on the part of the petitioner in establishing this fact. I am rather surprised at the stance taken by the Director-in-Chief (Administration), Health Department for it is settled legal proposition that a denial not necessarily should be accompanied with evidence. It is equally well settled that if a person denies a situation it is for the other side to prove otherwise. Now even when through the representations present at Annexures 5, 6 and 8 the petitioner had specifically stated that he was not gainfully employed nor had other source of income for the interregnum period yet his claim has been rejected in absence of supportive documents. Obviously a situation where the petitioner claims no source of income, cannot be



established by supportive documents. It was entirely for the department to prove otherwise but they have failed to do so as manifest from the impugned order. Even when the reasons attached for rejecting the claim is absurd and not lawfully sustainable this lacuna is sought to be filled up by the supplementary counter affidavit which again simply alleges an income source through property possessed by the petitioner. Clearly the respondents are trying to fill up the lacuna present in the impugned order through a supplementary counter affidavit which attempt has been deprecated by the Supreme Court in the case of **Mohinder Singh Gill** (supra) and rightly relied upon by Mr. Shiv Kumar, learned counsel for the petitioner. I am persuaded to reproduce paragraph 8 of the judgment which would be most appropriate in the present instance:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*<sup>2</sup>:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they



grow older.”

The reasons assigned at paragraph 9 of the second supplementary counter affidavit are not the reasons on which the claim of the petitioner has been rejected and the respondents cannot be permitted to supplement the same by way of affidavit.

For the reasons and discussions aforementioned the order bearing Memo No.892(4) dated 5.9.2016 of the Director-in-Chief, Health Department, Bihar, Patna impugned at Annexure-9 cannot be upheld and is accordingly quashed and set aside. The Director-in-Chief, Health Department, Bihar, Patna is accordingly directed to make the payment of arrears of salary for the period 8.3.2003 to 4.11.2013 to the petitioner within a period of three months from the date of receipt/production of a copy of this order.

The writ petition is allowed.

**(Jyoti Saran, J)**

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